

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Alexandria Division

UNITED STATES OF AMERICA	)	
	)	
v.	)	Crim. No. 01-455-A
	)	Hon. Leonie M. Brinkema
ZACARIAS MOUSSAOUI	)	

GOVERNMENT'S RESPONSE TO DEFENDANT'S  
MOTION TO STRIKE SURPLUSAGE

Defendant has filed a motion to strike what he claims is "inflammatory" surplusage from the Indictment. (Docket #471). For the reasons set forth herein, this motion should be denied.

The defendant seeks to strike the overt acts in the indictment relating to the efforts of *al Qaeda* to obtain nuclear weapons and their components (overt act 4),<sup>1</sup> the issuance of *fatwahs* to expel American forces from the Horn of Africa (overt act 6),<sup>2</sup> and Bin Laden's endorsement of "The Nuclear Bomb of Islam" (overt act 10).<sup>3</sup> He also seeks to strike the allegations "regarding chemical weapons."

Motions to strike surplusage from an indictment "will be granted only where the challenged allegations are 'not relevant to the crime charged and are inflammatory and

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<sup>1</sup> Overt Act 4 reads: "At various times from at least as early as 1992, Usama Bin Laden, and others known and unknown, made efforts to obtain the components of nuclear weapons."

<sup>2</sup> Overt Act 6 reads: "At various times from in or about 1992 until in or about 1993, Usama Bin Laden, working together with members of the fatwah committee of al Qaeda, disseminated fatwahs to other members and associates of al Qaeda that the United States forces stationed in the Horn of Africa, including Somalia, should be attacked."

<sup>3</sup> Overt Act 10 reads: "On or about May 29, 1998, Usama Bin Laden issued a statement entitled "The Nuclear Bomb of Islam," under the banner of the 'International Islamic Front for Fighting the Jews and the Crusaders,' in which he stated that "it is the duty of the Muslims to prepare as much force as possible to terrorize the enemies of God."

prejudicial.”” *United States v. Scarpa*, 913 F.2d 993, 1013 (2d Cir. 1990)(quoting *United States v. Napolitano*, 552 F. Supp. 465, 480 (S.D.N.Y. 1982)); *See United States v. Hernandez*, 85 F.3d 1023, 1030 (2d Cir. 1996) (same); *United States v. Poore*, 594 F.2d 39, 41 (4<sup>th</sup> Cir. 1979); *United States v. Bin Laden*, 91 F. Supp. 2d 600, 621 (S.D.N.Y. 2000) (same); *United States v. Booth*, 1999 WL 1192317 at \*10 (S.D.N.Y. 1999) (same). ““If evidence of the allegation is admissible and relevant to the charge, then regardless of how prejudicial the language is, it may not be stricken.”” *Scarpa*, 913 F.2d at 1013 (quoting *United States v. DePalma*, 461 F. Supp. 778, 797 (S.D.N.Y. 1978)); *United States v. Booth*, 1999 WL 1192317 at \*10 (same). Any surplusage analysis, therefore, examines the relevance of what is alleged.

The defendant seeks to strike the above-described allegations for two reasons. The first, he asserts, is that these allegations have nothing “to do with 9/11,” and the second is that they involve conduct that pre-dates the defendant’s oath of allegiance to Bin Laden and *al Qaeda*. Neither claim has any merit.

First, regardless of whether the allegations have something to “do with 9/11,” they are plainly relevant to the conspiracies charged in the indictment. As noted in prior pleadings by the Government, the counts in the indictment do not charge the defendant, in substantive counts, with participating in the attack of September 11. (See Government’s Response to Standby Counsel’s Memorandum Regarding Rule 11 Considerations, July 25, 2002). Rather, they charge the defendant with participating in conspiracies to: commit terrorist acts transcending national boundaries; use weapons of mass destruction; murder United States Government employees; destroy property, commit aircraft piracy; and destroy aircraft. Therefore, for example, the allegations regarding nuclear and chemical weapons are relevant to what types of transnational

terrorist acts the defendant and his co-conspirators plotted to commit, what type of weapon of mass destruction the defendant and his co-conspirators intended to use, and how the defendant and his co-conspirators planned to murder United States government employees and to destroy property. Concurrently, as a result, it is not required that each overt act alleged in the indictment be directly relevant to the other overt acts involving the September 11 attack. *See United States v. Bin Laden*, 109 F. Supp. 2d 211, 217 (S.D.N.Y. 2000) (evidence of embassy bombings, included as overt acts in conspiracy charges, relevant to conspiracy charges against defendants not alleged to have participated in embassy bombings). Moreover, the allegations regarding the collection and potential use of nuclear and/or chemical weapons are relevant to the conspiracy counts involving aircraft piracy and destruction of aircraft as they put into context the core allegation in the indictment: that members and/or associates of *al Qaeda* declared war on the United States and sought to use virtually any means available to murder Americans *en masse*. *See United States v. Burgos*, 94 F.3d 849, 858-59 (4<sup>th</sup> Cir. 1996) (*en banc*) (in narcotics conspiracy case: “a defendant’s participation in the conspiracy need not be explicit; it may be inferred from circumstantial evidence . . . . In addition to selling narcotics, that participation may assume a myriad of other forms, such as supplying firearms or purchasing money orders for coconspirators or permitting them to store narcotics and other contraband in one’s home, or purchasing plane tickets.”) (omitting citations and quotations); *United States v. Wilson*, 565 F. Supp. 1416, 1439 (S.D.N.Y. 1983) (“The existence of a conspiracy and a defendant’s participation therein is usually established by . . . independent proof of each alleged co-conspirator’s . . . conduct . . . and the totality of conduct of all the participants and the reasonable inferences to be drawn therefrom.”).

Thus, for similar reasons the allegations regarding the various *fatwahs* issued by and on behalf of Bin Laden are relevant to all the conspiracy charges in the Indictment. As alleged in the Indictment, “[m]embers of al Qaeda issued *fatwahs* (rulings on Islamic law) indicating that such attacks [in Saudi Arabia and Somalia] were both proper and necessary.” (Indictment, ¶ 3). These *fatwahs*, and the evidence regarding them, are important to understanding the methods *al Qaeda* uses to motivate its adherents and are evidence in themselves of the motives behind the war *al Qaeda* has declared and carried out against the United States and its citizens. In this case, the *fatwahs* reveal that *al Qaeda* has declared war, and commits terrorist acts, against the United States, among other reasons, because of the American presence in the Saudi Peninsula and the Horn of Africa.

Moreover, the Government expects that there will be testimony at trial that the *fatwah* regarding Somalia specifically described the acceptability of collateral casualties in the course of attacks against American targets. This is clearly relevant to the allegations regarding *al Qaeda*’s plans to attack civilian targets, including the World Trade Center, where it might be anticipated that non-Americans and/or Muslims would be killed in the attacks. Such a *fatwah*, in the eyes of an *al Qaeda* supporter, is critical to justifying his participation in a plan to participate in such indiscriminate terrorist attacks against the ultimate enemy, the United States.<sup>4</sup>

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<sup>4</sup> In his August 1996 Declaration of *Jihad*, Bin Laden stated: “The right reply for the situation that we are living in is to follow what have been decided by the people of knowledge, as was said by Ibn Taymiyyah, God have mercy on his soul, that people of Islam should join forces and support each other to get rid of the Great Pagan, which is controlling the Muslim world, and to bear the lesser damage in order to get rid of the Great Pagan.”

Equally without merit is Moussaoui's claim that the allegations at issue should be excised because they involve conduct of his co-conspirators that precedes his membership in *al Qaeda* (and, implicitly, the conspiracies). Simply put, it is hornbook law that a defendant is liable for the acts of his co-conspirators committed during the life of the conspiracy. See *United States v. Rea*, 958 F.2d 1206, 1214 (2d Cir. 1992) ("The defendant's knowledge of the conspiracy and participation in it with the requisite criminal intent may be established through circumstantial evidence. A defendant need not have joined a conspiracy at its inception in order to incur liability for the unlawful acts of the conspiracy committed both before and after he or she became a member.") (citations omitted). Indeed, the Fourth Circuit has approved a jury charge that instructs that "[o]nce the conspiracy is in existence, the act and the statement of each member of the conspiracy is considered to be the act of each member of the conspiracy, and each member of the conspiracy is therefore responsible for the acts and the statements of the other members of the conspiracy taken during the existence of the conspiracy, in furtherance of the conspiracy, just as if such person performed such act herself or himself." *United States v. Anjum*, 961 F. Supp. 883, 889 (D. Md. 1997) (citing *United States v. Chorman*, 910 F.2d 102, 111 (4<sup>th</sup> Cir. 1990)). Thus, the overt acts are on their face relevant to the charges contained in the Indictment and are directly

related to the determination of the defendant's guilt. Accordingly, the defendant's motion to strike these allegations should be rejected.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on September 6, 2002, a copy of the foregoing Government's Response was sent by hand delivery, via the United States Marshal's Service to:

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I further certify that on the same day a copy of the same attached pleading was sent by facsimile and regular mail to:

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